Nos. 76-1831, 76-1833, and 76-1839

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROLD MASSLER, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL RICE and JOHN LESLIE WELLS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

PEDRO ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Massler Pet. App. 2a-26a) is reported at 550 F. 2d 1364. The opinion of the district court (Rice Pet. App. 4a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals (Massler Pet. App. 1a) was entered on April 20, 1977. Petitions for rehearing were denied on May 24, 1977 (Rice Pet. App. 70a-71a). The petitions for a writ of certiorari were filed on June 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly denied, without a hearing, petitioners' motions to dismiss the indictment on the ground that due process had been violated by a pre-indictment delay of three and one-half years.

2. Whether, in the circumstances of this case, petitioner Alvarez was denied a fair trial by the district court's admission of evidence concerning his involvement in prior similar offenses.

3. Whether the district court properly permitted petitioner Massler to impeach a government witness by introducing a prior inconsistent written statement of the witness, which statement omitted any reference to petitioner Massler but mentioned the remaining petitioners.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to import, possess, and distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 952(a). Petitioner Alvarez was sentenced to three years' imprisonment, petitioner Wells to one year's imprisonment, and petitioners Rice and Massler to two and one-half years' imprisonment, each to be followed by

a mandatory special parole term. The court of appeals affirmed in a thorough opinion (Massler Pet. App. 2a-26a).

The government's evidence at trial consisted primarily of the testimony of William Kilgore, an unindicted co-conspirator who previously had been convicted of participation in a separate conspiracy to import marijuana (5 Tr. 20). Kilgore testified that, in February 1972, petitioner Alvarez hired him to guard a cache of marijuana that was concealed at a "stash house" in Odessa, Florida. For approximately three weeks, Kilgore weighed the marijuana for customers and received payments on behalf of petitioner Alvarez, who visited the premises periodically to collect the money (1 Tr. 31-32). Petitioner Alvarez informed Kilgore that the marijuana (which was stored in bales and burlap sacks (1 Tr. 33)) had come from Colombia, South America (1 Tr. 37).

During this period, petitioner Alvarez took Kilgore to another nearby stash house operated by co-conspirators Michael Sarga and Derril Lee. Inside a rear bedroom, Kilgore observed four to six bales of marijuana, each bale weighing 40 to 75 pounds. Petitioner Alvarez told Kilgore that he also owned the marijuana stored at the second house (1 Tr. 38-40).

In late February or early March 1972, Kilgore and petitioner Alvarez traveled to New York to complete another drug deal (2 Tr. 94). At petitioner Alvarez' instruction, Kilgore and a man named Allen Jacobs went to Woodstock, New York, to guard a stash house (2 Tr. 95-98, 101). Shortly after Kilgore and Jacobs reached the house, Sarga and petitioner Massler arrived with about 350 pounds of marijuana concealed in a boat on top of a van. The marijuana, which had been transported from Florida, was unloaded and stored inside the house (2 Tr.

103-109). The following day, petitioner Alvarez directed Kilgore to transfer 200 pounds of marijuana to petitioner Massler and Jacobs on a consignment basis (2 Tr. 110). Later that day, again acting on petitioner Alvarez' instructions, Kilgore and Sarga delivered the remainder of the marijuana to petitioner Massler (2 Tr. 111-112). Kilgore remained in New York for one week, during which time he collected about $120,000 from Jacobs and petitioner Massler in payment for the marijuana (2 Tr. 114-115). He then returned to Florida and gave the money to petitioner Alvarez (2 Tr. 119-120).

In April 1972, petitioner Alvarez asked Kilgore to fly to Colombia to obtain more marijuana. Kilgore was advised that the pilots on the trip would be petitioners Rice and Wells, and he was instructed to pay the Colombian suppliers upon arrival, to accept delivery of the marijuana, and to guard the contraband on the return flight. In return, petitioner Alvarez promised to pay Kilgore $5,000 (3 Tr. 41-47). Petitioner Alvarez then drove Kilgore to a motel where Kilgore met petitioners Rice and Wells.[1] During this meeting, petitioner Rice handed Kilgore a shoe box containing $80,000 and mentioned that he and petitioners Wells and Alvarez had made a previous trip to Colombia to obtain marijuana (3 Tr. 50-52).

The next day, Kilgore flew to Colombia with petitioners Rice and Wells. After Kilgore had delivered the money to the Colombian suppliers, burlap sacks containing about 3,500 pounds of marijuana were loaded onto the airplane (3 Tr. 79; 4 Tr. 86-89). On return to the United States, petitioners Rice and Wells landed the plane

[1]Motel records showed that petitioner Wells and two other persons had registered at the motel on April 7, 1972 (9 Tr. 154-155, 163-164).

at a small airport in Florida and left Kilgore to guard the contraband (4 Tr. 94-95).[2] Soon thereafter petitioner Alvarez and several companions arrived in a camper, transferred the marijuana from the plane, and drove it to a house (4 Tr. 96-99).

Subsequently, Kilgore again traveled to New York at petitioner Alvarez' request to collect money from petitioner Massler. Kilgore made the trip but returned to Florida empty-handed (4 Tr. 143-145; 5 Tr. 4-5). A few days later, however, petitioner Massler personally visited Kilgore's apartment in Florida and delivered more than $100,000 to petitioner Alvarez (5 Tr. 5-7).

Kilgore's testimony was substantially corroborated by a number of incriminating photographs, taken by one of the conspirators during the course of the drug operation, which depicted members of the conspiracy engaged in conspiratorial acts at various locations. The negatives of these photographs were discovered by the manager of the photography department of a local store, to which the film had been brought for developing (9 Tr. 184-196, 218-220).

[2]The aircraft used to transport the marijuana had been leased to petitioner Rice in February 1972 by Charles Porter, whom Rice previously had approached about the possibility of using an airplane to import marijuana (11 Tr. 90-91, 95-98). Shortly after the lease had been executed, Porter observed petitioner Rice and several other individuals unloading what appeared to be burlap sacks containing vegetable matter (11 Tr. 107-112, 137). On another occasion, in April or May 1972, Porter noticed some activity around the airplane late at night (11 Tr. 121-123). Furthermore, either petitioner Rice or petitioner Wells had made inquiries of Porter concerning the addition of surplus fuel tanks to the airplane (11 Tr. 124-126).

ARGUMENT

1. Petitioners Massler, Rice, and Wells contend (Massler Pet. 6-7; Rice and Wells Pet. 9-27) that their indictment should have been dismissed on due process grounds because of a delay of three and one-half years from the conclusion of the conspiracy until the institution of criminal charges. Petitioners further contend that, at the very least, the district court should have conducted an evidentiary hearing prior to trial to inquire into the cause for the delay. The court of appeals correctly concluded (Massler Pet. App. 11a-12a), however, after a thorough review of the record, that petitioners had made no showing of actual prejudice to their defenses because of the delay and that, accordingly, their due process claim was without substance.

Here, as in the courts below, petitioners' claims of prejudice consist entirely of general, unsupported assertions that recollections have faded (Massler Pet. 13-18) or that unnamed witnesses have been lost (Rice and Wells Pet. 10). The court of appeals correctly determined that such speculative allegations fall far short of the showing of actual prejudice that is an essential element of a due process claim. See *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 6-7; *United States* v. *Marion*, 404 U.S. 307, 325-326; *United States* v. *Seawell*, 550 F. 2d 1159, 1164 (C.A. 9); *United States* v. *Finkelstein*, 526 F. 2d 517, 526 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960.

Nor is there any basis to petitioners' claims (Massler Pet. 6-12; Rice and Wells Pet. 11) that the length of the pre-indictment delay in this case itself was enough to suggest that the government intentionally postponed instituting criminal charges in order to secure a tactical advantage. The period between the completion of

petitioners' illegal venture and their indictment was well within the applicable statute of limitations and was of approximately the same duration as the delay in *Marion*, where the Court rejected a similar argument that a due process violation could be presumed merely from the length of the pre-indictment delay (404 U.S. at 325-326).

Finally, the court of appeals correctly rejected petitioners' contention that the government purposely delayed an indictment to procure evidence of petitioners' subsequent criminal acts, since no such evidence was offered against any of the petitioners at trial (Massler Pet. App. 11a).[3]

In sum, in view of petitioners' failure to allege with specificity that the pre-indictment delay in this case resulted in actual prejudice to their defenses and was the product of improper government conduct, the district court correctly denied their motions to dismiss the indictment without an evidentiary hearing. Indeed, events at trial failed to substantiate any of petitioners' claims of prejudice. See *United States* v. *Marion, supra*, 404 U.S. at 326.

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[3]In view of petitioners' inability to show that the delay in this case was the result of an attempt to secure a tactical advantage, petitioners' vague and unsubstantiated claims of prejudice, even if accepted as true, would not have entitled them to dismissal of the indictment on due process grounds. The district court's refusal to hold an evidentiary hearing on petitioners' motions therefore was within its discretion. "Evidentiary hearings need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved." *United States* v. *Carrion*, 463 F. 2d 704, 706 (C.A. 9). See also *Fontaine* v. *United States*, 411 U.S. 213, 215; *Blackledge* v. *Allison*, No. 75-1693, decided May 3, 1977, slip op. 10. We note in addition that only petitioner Massler requested an evidentiary hearing on his pre-trial motion and that none of the petitioners voiced objection to the district court's denial of his motion on the ground that he was entitled to a hearing.

2. Petitioner Alvarez contends (Pet. 7-11) that the district court committed reversible error by admitting evidence of his prior criminal conduct. At trial, after identifying petitioner Alvarez, Kilgore testified that he first met Alvarez in 1968 or 1969. When asked about the nature of his initial association with petitioner Alvarez, Kilgore replied, "[w]e used to trade guns for dope and—" (Alvarez Pet. App. 36-37). After petitioners had objected to this testimony. Kilgore explained that when he said "dope" he was referring to marijuana and hashish (*id.* at 49-50). The district court concluded that Kilgore's testimony was admissible solely against petitioner Alvarez under Rule 404(b) of the Federal Rules of Evidence. Accordingly, the court instructed the jury that the evidence could be considered only with respect to petitioner Alvarez and should "receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence to be adduced before you in the trial of this case" (*id.* at 47).[4]

The court of appeals correctly held that, while it was error to allow Kilgore to mention petitioner Alvarez' past involvement with guns, the error was harmless beyond a reasonable doubt under the particular facts of this case (Massler Pet. App. 19a-21a). In view of the overwhelming proof, including photographic evidence, of petitioner's guilt, the brief, isolated reference during "such a massive trial could not have possibly influenced the jury to reach an improper verdict" (*id.* at 20a). See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765; *United States* v. *Trotter*, 529 F. 2d 806, 814, n. 13 (C.A. 3); *United States* v.

[4]Prior to its final charge to the jury, the district court inquired whether petitioner Alvarez also desired a limiting instruction with respect to the evidence of other crimes. Petitioner's attorney declined the offer (Massler Pet. App. 21a).

Resnick, 488 F. 2d 1165, 1168 (C.A. 5), certiorari denied, 416 U.S. 991; *United States* v. *Cable*, 446 F. 2d 1007, 1008-1009 (C.A. 8).[5] Indeed, petitioner's express rejection of a limiting instruction on the evidence of other crimes indicates that he also believed that this single statement would have had little or no impact upon the jury in the context of the entire trial.

3. Petitioners Alvarez, Rice, and Wells contend (Alvarez Pet. 11-14; Rice and Wells Pet. 27-38) that the district court erred in allowing petitioner Massler to place into evidence a handwritten statement previously prepared by Kilgore. The statement (Alvarez Pet. App. 67-68) described certain aspects of the conspiracy in general terms. At trial, Kilgore's testimony differed in some respects from his handwritten account, but the principal discrepancy concerned the fact that the written statement contained no mention of petitioner Massler.

After petitioners Alvarez and Massler had cross-examined Kilgore about the statement (Massler Pet. App. 21a), Massler indicated that he intended to offer the document into evidence. After several conferences with counsel, the court admitted the writing as evidence of a prior inconsistent statement under Rule 613(b), Fed. R.

[5]Petitioner Alvarez erroneously relies on two Sixth Circuit cases to support his contention that there is a conflict among the courts of appeals concerning whether evidence of other crimes may be treated as harmless error. In *United States* v. *Ailstock*, 546 F. 2d 1285, 1290-1291 (C.A. 6), and *United States* v. *Blanton*, 520 F. 2d 907, 910 (C.A. 6), the court simply concluded that the proof against the defendants could not be considered overwhelming and thus that the erroneous introduction of prejudicial evidence of other crimes could not be characterized as harmless. In contrast, the court below, after careful scrutiny of the record of this case, determined that the proof against petitioner was sufficiently compelling to ensure that the jury was not swayed by the improperly admitted evidence.

Evid. Petitioners Alvarez, Rice, and Wells then moved for a severance and for a mistrial, which were denied (Alvarez Pet. App. 52-64). In its final charge, the court instructed the jury on the limited use that could be made of a prior inconsistent statement (Massler Pet. App. 23a):

> The testimony of a witness may be discredited * * * by showing that he previously made statements which are inconsistent with his present testimony. *The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements.* [Emphasis added by the court of appeals.]

Although petitioners do not appear to dispute that Kilgore's handwritten statement met all the requirements for admissibility under Rule 613(b), they argue that the statement was a "neat condensation" of Kilgore's testimony and was so prejudicial to them that the court should either have excluded the evidence or have granted a severance of their case from that of petitioner Massler.[6] The court of appeals correctly disposed of these claims (Massler Pet. App. 22a-23a).

To begin with, Kilgore's written statement was not entirely consistent with his trial testimony. Unlike Kilgore's testimony, his statement omitted any reference to petitioner Massler (which may have led the jury to question Kilgore's general credibility). Indeed, prior to

[6]There is no merit to petitioner Alvarez' claim that a conflict exists among the circuits concerning the proper application of Rule 613(b) in circumstances similar to those involved here. All of the cases cited by petitioner were decided prior to the enactment of the Federal Rules of Evidence. Moreover, those cases were concerned with the hearsay nature of the prior statements, whereas here the jury was expressly instructed that Kilgore's notes could not be taken as substantive evidence.

petitioner Massler's offer of the statement in evidence, petitioner Alvarez had cross-examined Kilgore based on certain other perceived inconsistencies between that statement and his testimony. Moreover, to the extent that the statement was consistent with Kilgore's trial testimony, which had been subjected to rigorous and thorough cross-examination, it added nothing to the case against petitioner Massler's co-defendants. Accordingly, the trial judge properly exercised his discretion in permitting petitioner Massler to place the statement in evidence. See *United States* v. *Rogers*, 549 F. 2d 490 (C.A. 8); *United States* v. *Barrett*, 539 F. 2d 244 (C.A. 1).

The district court properly limited the use to which the statement could be put by expressly instructing the jury that the handwritten statement was not admissible as substantive evidence and could only be considered for impeachment purposes.[7] Petitioners Rice and Wells urge, however, that in this case, as in *Bruton* v. *United States*, 391 U.S. 123, a cautionary instruction was not adequate to limit the jury's consideration of the evidence. *Bruton* involved the admission into evidence of a post-arrest confession by Bruton's co-defendant, implicating himself and Bruton in the commission of the crime. The evidence was admitted only against the co-defendant, who did not testify at the joint trial and thus was not subject to cross-examination concerning his confession. Concluding that a limiting instruction had been insufficient to protect Bruton's rights in these circumstances, the Court stressed the unreliability of the confession, which had not been tested by cross-examination (*id.* at 136-137), and the

[7]Although petitioners Rice and Wells now challenge the sufficiency of the trial judge's limiting instruction (Pet. 33), they did not raise this objection in the court of appeals (Massler Pet. App. 23a).

"powerfully incriminating extrajudicial statements" at issue (*id.* at 135). Here, by contrast, the evidence was admitted for impeachment purposes and not for its truth, and the declarant testified at trial and was cross-examined extensively. See *Nelson* v. *O'Neill*, 402 U.S. 622, 626-627. Moreover, this Court expressly recognized in *Bruton* that in "many circumstances * * * reliance [on limiting instructions] is justified" (391 U.S. at 135), and that in most instances a reviewing court must presume that the jury conscientiously followed the trial judge's instructions. See *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 366-367; *Opper* v. *United States*, 348 U.S. 84, 95; *United States* v. *Davis*, 546 F. 2d 617, 620-621 (C.A. 5).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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